Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1321

In The
Supreme Court of the United States
October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. McGRANE
Assistant Attorney General

October 23, 1985

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

ARGUMENT 2

I. THE IOWA SUPREME COURT'S DETERMINATION THAT COUNSEL HAD COMPELLING REASON TO BELIEVE THAT WHITESIDE INTENDED TO TESTIFY FALSELY IS NOT SUBJECT TO ATTACK IN THIS COURT 2

A. The Iowa Supreme Court's Determination Involves A Question Of Historical Fact Entitled To The Presumption Of Correctness Under 28 U.S.C. § 2254(d) 2

B. The Record Establishes Beyond A Reasonable Doubt That Whiteside Intended To Testify Falsely At Trial 3

II. RESPONDENT'S "NO HOLDS BARRED" APPROACH TO CRIMINAL DEFENSE WOULD DESTROY ORDERLY TRIALS IN THE NATION'S COURTROOMS 5

III. A CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE THE RIGHT TO REQUIRE HIS OR HER ATTORNEY TO ACTIVELY ASSIST IN THE PERPETRATION OF A FRAUD UPON THE COURT 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Cuyler v. Sullivan, 446 U.S. 335 (1980) 2

Geders v. United States, 425 U.S. 80 (1976) 7

Hill v. Nelson, 466 F.2d 1346 (9th Cir. 1972) 4

State v. Whiteside, 272 N.W.2d 468 (1978) 2, 3

Sumner v. Mata, 449 U.S. 539 (1980) 2

United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) 3

Velleca v. Superintendent, 523 F.2d 1040 (1st Cir. 1975) 4

OTHER AUTHORITIES

28 U.S.C. § 2254(d) 2

No. 84-1321

In The
Supreme Court of the United States
October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief on the merits in the above-captioned proceedings.

ARGUMENT

I. THE IOWA SUPREME COURT'S DETERMINATION THAT COUNSEL HAD COMPELLING REASON TO BELIEVE THAT WHITESIDE INTENDED TO TESTIFY FALSELY IS NOT SUBJECT TO ATTACK IN THIS COURT.

A. The Iowa Supreme Court's Determination Involves A Question Of Historical Fact Entitled To The Presumption Of Correctness Under 28 U.S.C. § 2254(d).

The Respondent contends whether Whiteside intended to commit perjury is a mixed question of law and fact not entitled to a presumption of correctness under *Sumner v. Mata*, 449 U.S. 539 (1980). *See* Respondent's Brief at 10. The narrow factual question, however, is not whether Whiteside intended to commit perjury, but whether Whiteside intended to testify falsely. *See State v. Whiteside*, 272 N.W.2d 468, 470-71 (1978) (Pet. App. at p. 37). The question whether Whiteside was planning to testify falsely does not involve "application of any legal principles to the historical facts of this case." *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). It involves only a question of plain fact wholly without legal conclusions. The determination that Whiteside intended to testify falsely is entitled to a presumption of correctness if "fairly supported by the record." *Sumner v. Mata*, 449 U.S. at 544-5.

Whether the presumptively correct facts establish that Whiteside intended to commit perjury does raise a legal question. The Respondent has not contested the legal conclusion that under the facts as determined by the Iowa Supreme Court, the Respondent's proposed course of action would have been perjury under Iowa law. *See State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978) (Pet. App.

A38) (Canon 4 of the Iowa Code of Professional Responsibility, which allows a lawyer to advise the court of a client's intention to commit a crime, vindicates action taken by Whiteside's attorneys). In any case, whether the facts support the view that the Respondent proposed to commit perjury is a question of state law to be determined by the Iowa Supreme Court.

B. The Record Establishes Beyond A Reasonable Doubt That Whiteside Intended To Testify Falsely At Trial.

In addition to attacking the Court of Appeal's willingness to afford a presumption of correctness to the state court factual findings in this case, the Respondent also asserts that an attorney's ethical obligation to prevent perpetration of fraud upon the court does not arise unless the lawyer knows beyond a reasonable doubt that the client intends to testify falsely. *See* Respondent's Brief at 11 n.9. The prevailing view, however, is that an attorney should simply have a firm factual basis for the belief. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3rd Cir. 1977). A more stringent standard would encourage collateral proceedings when the attorney rather than the defendant would be on trial.

In any case, the Iowa Supreme Court's holding here is consistent with the Respondent's premise. It noted that an attorney should not decide what is true and what is not without "compelling" support, a standard at least as stringent as reasonable doubt. *State v. Whiteside*, 272 N.W.2d at 470-71 (Pet. App. A37). After canvassing the record, the court concluded that there was compelling support for the lawyer's conclusion that his client was proposing to testify falsely. *Id.*

The factual determination of the Iowa Supreme Court is entitled to a presumption of correctness and must be affirmed by a federal court if the finding is supported by substantial evidence. *See Velleca v. Superintendent*, 523 F.2d 1040, 1041-42 (1st Cir. 1975) (per curiam). *But see Hill v. Nelson*, 466 F.2d 1346, 1348 (9th Cir. 1972) (per curiam). Even if this court were inclined to conduct a de novo review of the Iowa Supreme Court's finding, however, the record plainly shows that Whiteside's lawyer knew beyond a reasonable doubt that his client was deliberately proposing to testify falsely.

First, Whiteside's belated claim that he actually saw a gun in the possession of Love is totally inconsistent with events on the night of the homicide. If Love actually had a weapon, he would have had little trouble ordering the intruders out of the apartment by simply pointing the weapon at the uninvited guests. Instead, Love arose from his bed and jumped toward Whiteside. (App. 14, 43) A person armed with a gun does not move toward an assailant whom he knows (App. 12) is armed with a knife, thereby unnecessarily exposing himself to the risk of being stabbed.

Second, Whiteside's claim was flatly contradicted by information uncovered by Robinson. Through his independent investigation, Robinson learned that none of the eyewitnesses to the homicide saw a gun in Love's hands. He further discovered that a police search of the apartment shortly after the killing—a search conducted with the specific intention of discovering weapons (Pet. App. A82)—did not uncover a gun. There simply was no gun. As a result, Robinson concluded that the only available defense would be to concede that no gun was present, but claim that the defendant nonetheless reasonably thought that Love was armed. (Pet. App. A78-82)

Third, Whiteside's own statements to counsel reveal an obvious intent to testify falsely. Whiteside repeatedly told his counsel that he did not actually see a gun, but only thought Love had a gun because of his reputation for violence. (Pet. App. A79) When his lawyers refused to cooperate in his scheme to testify that he actually saw a gun, Whiteside did not proclaim the truth of his assertion. Instead, he declared "in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. A85) While Whiteside did not use the term "perjury," he told his lawyer clearly and unmistakably that he proposed to testify falsely in order to avoid conviction.

In sum, the events of the evening, the results of Robinson's independent investigation, and the statements of Whiteside himself established beyond a reasonable doubt that Whiteside was proposing to testify falsely at trial.

II. RESPONDENT'S "NO HOLDS BARRED" APPROACH TO CRIMINAL DEFENSE WOULD DESTROY ORDERLY TRIALS IN THE NATION'S COURTROOMS.

The Repondent apparently believes that a conflict of interest is present whenever the allegiance of counsel is supposedly divided "between his desire to do what he believed was demanded by ethical rules and his client's right to effective advocacy of his defense." Respondent's Brief at 20. The Respondent thus implies that counsel should do anything to help his client's cause notwithstanding ethical rules to the contrary.

Under Respondent's framework, an attorney should organize a demonstration outside the courthouse, notwithstanding ethical restraints, if he or she thought such action

would advance his or her client's cause. Similarly, a lawyer might be required deliberately and unethically to provoke a mistrial in a case proceeding poorly from the defense point of view. Perhaps a lawyer would even be required to threaten jurors or seek to influence them improperly. The Respondent's "no holds barred" approach to criminal defense would transform orderly courtrooms into legal jungles where the knowledge and skill of defense counsel in the guerilla arts would be more important than traditional advocacy skills.

III. A CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE THE RIGHT TO REQUIRE HIS OR HER ATTORNEY TO ACTIVELY ASSIST IN THE PERPETRATION OF A FRAUD UPON THE COURT

The Respondent contends that a criminal defendant may force an attorney to call him or her to the stand, to elicit patently false testimony through direct examination, and to argue the false evidence to the jury. Respondent's Brief at 14. In short, Respondent believes the constitutional right to effective assistance of counsel encompasses the right to an unethical attorney when a criminal defendant thinks it is in his interest to present false evidence.

Such a rule would have a devastating impact on the administration of criminal justice. A rule that requires a lawyer to participate in the manufacture and presentation of false evidence would undermine notions of truthfulness and integrity that are essential to public confidence in the criminal justice system. It would make it difficult to depend on attorney self-policing that is critical to the operation of a system where daily judicial su-

pervision is impossible. In addition, a criminal justice system which allowed defendants to obtain the assistance of lawyers in cheating and lying would undercut notions of personal responsibility inherent in our notions of criminal justice.

As was noted by Justice Marshall in *Geders v. United States*, 425 U.S. 80, 93 (1976):

> . . . if our adversary system is to function according to design, we must assume that an attorney will observe his responsibility to the legal system as well as to his client.

If the Respondent prevails in this case, the assumption that attorneys will conduct themselves in a manner consistent with legal ethics will no longer be justified.

CONCLUSION

For all the above reasons, and the reasons previously expressed in the Petitioner's Brief on the Merits, it is respectfully submitted that the opinion and decision of the Court of Appeals in the above-captioned matter must be reversed.

Respectively submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

THOMAS D. MCGRANE
Assistant Attorney General